No. 92-1402

IN THE
Supreme Court of the United States
OCTOBER TERM, 1993

C & A CARBONE, INC.,
RECYCLING PRODUCTS OF ROCKLAND, INC.,
C & C REALTY, INC., and
ANGELO CARBONE,
Petitioners,

v.

TOWN OF CLARKSTOWN,
Respondent.

On Writ of Certiorari to The Supreme Court, Appellate Division, Second Department of the State of New York

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PETITIONERS' REPLY BRIEF

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PETITIONERS' REPLY BRIEF

The host of legal and policy arguments advanced by Respondent and its amici ignore two crucial facts. First, the trash in this case comes from outside the regulating jurisdiction; it is *not* trash generated by local residents.[1] Second, the trash here is *not* disposed of locally; rather, it is shipped (whether by Petitioners or by Respondent's designated facility) to disposal sites outside the regulating jurisdiction and most likely out of state.[2] Thus, the local disposal of local trash simply is not in issue.

These two facts have decisive implications for analysis of this case. First, they unquestionably establish that the trash in *this* case is moving in interstate commerce. Petitioners' facility is no more than a temporary stop for

[1] Pet. Br. 5-6; Angelo Carbone Aff., J.A. 12, R. 81; Angelo Carbone Aff., J.A. 117, R. 332.

[2] Pet. Br. 6; Angelo Carbone Aff., J.A. 12-13, R. 81-82; Angelo Carbone Aff., J.A. 117, R. 332.

inspection, sorting, and packaging of trash on that interstate journey. This case thus differs entirely from the various hypotheticals posed by Respondent in which locally generated trash or sewage is collected, treated and deposited within the bounds of the regulating jurisdiction.

Second, these facts establish an interference with interstate commerce subject to the *per se* rule of *City of Philadelphia v. New Jersey*, 437 U.S. 617 (1978), and this Court's local processing cases. Those cases forbid a state not only from blocking commerce at its borders, but also from conditioning export upon some form of local activity, regardless of the relative burdens on local and out-of-state entities. The Clarkstown ordinance squarely violates those prohibitions by outlawing the export of trash except when processed through the designated transfer facility, so as to generate revenues for that facility.

Third, the out-of-town destination of the trash involved in this case eliminates the various environmental rationalizations urged by Respondent. Because the trash in this case is headed out of town, whether through the designated facility or Petitioners' facility, it can have no local environmental impact in either case. Indeed, the record reflects that both facilities ship to the same out-of-state landfills.

Finally, because this case involves trash originating out of town, policy arguments based on the need for flow control to support the financing of waste disposal facilities are irrelevant. None of the numerous amicus briefs asserts that control of out-of-town waste is essential to the financing of a local facility. In any event, these policy arguments are more appropriately addressed to Congress and the Environmental Protection Agency, which are currently considering whether flow control should be authorized in specified circumstances.

I. THE TRASH AT ISSUE HERE IS IN INTERSTATE COMMERCE

Respondent initially attempts to argue that the trash involved in this case is not an "article of commerce" because trash has "negative value" and "is not in demand by anyone." Resp. Br. 20-21 & n.17. Any such argument is squarely foreclosed, however, by this Court's decisions in *Fort Gratiot* and *City of Philadelphia*. "Solid waste, even if it has no value, is an article of commerce." *Fort Gratiot Sanitary Landfill, Inc. v. Michigan Dep't of Natural Resources*, 112 S. Ct. 2019, 2023 (1992).

Taking a similar tack, some amici argue that the Commerce Clause does not apply to laws forbidding the export of trash because garbage is not a natural resource. Whether garbage is natural or not, control over the flow of garbage *is* a valuable asset. "Generators of garbage pay, often handsomely, for its removal and disposal," Prince George's County Br. 44-45. This is confirmed by the briefs of Respondent and many of the same *amici*, who vigorously argue the financial virtues of flow control for local governments.[3] Indeed, Respondent's pursuit of the interstate trash in this case belies any notion that it is without value.[4]

In fact, the financial obligations of municipal governments to privately-owned waste handling facilities have led to an inversion of the situation previously before this Court. Where states and their political subdivisions once attempted to halt or penalize the entry of trash into their jurisdictions, the needs of the new waste handling facilities have made trash a sought-after commodity. The states

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[3] *See* Resp. Br. 30, 45-46; Ogden Projects Br. 11-13; City of Indianapolis Br. 12-13; New York State Br. 13; San Diego Br. 7-10; State of Ohio Br. 18-19.

[4] According to the town's supervisor, this action was brought because the bypassing of the designated facility was "costing the TOWN and its residents thousands of dollars daily as well as increasing the likelihood of the TOWN's failure to meet its contractual obligation to the transfer station." Affidavit of Charles Holbrook, Town Supervisor, Town of Clarkstown, J.A. 11, R. 60. Contrary to Respondent's suggestion, Resp. Br. 34 n.40, this statement does not represent simply the personal views of a single official; the affidavit was introduced *by Respondent* to support the town's request for an injunction against Petitioners.

concede that "[g]luts of disposal capacity . . . are . . . occurring." State of Ohio Br. 16.[5] Local governments have responded accordingly; New Jersey, for example, permits its trash to leave the state for the purpose of removing recyclables, but *requires* that the nonrecyclable residue be returned to the state so that local jurisdictions can reap the financial advantages of disposing of the trash. New Jersey Br. 5, 14.

City of Philadelphia and its progeny established that interstate commerce in an article is protected even where the real source of value—the capacity to dispose of it—was distinct from the article and did not cross state lines. Similarly, in this case, the intrinsic value of garbage is irrelevant, especially when local residents are deriving undisputed financial benefits from diverting its flow.

Respondent next seeks to escape Commerce Clause scrutiny on the ground that Local Law 9 "intervenes before locally discarded garbage enters commerce," *i.e.*, that the trash does not enter commerce "until it is shipped out of the [designated] facility to final disposal sites." Resp. Br. 16. This effort to characterize the nonrecyclable trash shipped by Petitioners as "locally discarded garbage" ignores settled Commerce Clause principles in three respects.

First, the trash at issue here entered interstate commerce even before it reached Petitioners' facility, because it was shipped from sources outside the town. J.A. 117, R. 332.[6] Goods do not "come to rest" and lose their

[5] *See also* Jeff Bailey, *Up In Smoke: Fading Garbage Crisis Leaves Incinerators Competing For Trash*, Wall St. J., Aug. 11, 1993, at A1; Barry Meier, *Finding Gold, of a Sort, in Landfills*, N.Y. Times, Sept. 7, 1993, at 14.

[6] While Petitioners contend that all of the trash processed by their facility originated outside the town, Respondent has alleged that Clarkstown trash was present in some of the loads departing Petitioners' facility. Pet. App. 6a. Should this case proceed to trial, Petitioners will show that any Clarkstown trash identified by Respondent was a result of the fact that the waste was dumped and inspected by town officials at the town's facility, where it was commingled with Clarkstown trash. Angelo Carbone Aff., J.A. 119-20, R. 334-35. For purposes of this Court's review, because this case was decided below on the town's motion for summary judgment, Pet. App. 7a, Petitioners are entitled to have these disputed facts viewed in their favor. *See Sillman v. Twentieth Century-Fox Film Corp.*, 3 N.Y.2d 395, 165 N.Y.S.2d 498, 144 N.E.2d 387 (N.Y. 1947); *Hourigan v. McGarry*, 106 A.D.2d 845, 484 N.Y.S.2d 243 (N.Y. App. Div. 1984); *Weiss v. Garfield*, 21 A.D.2d 156, 249 N.Y.S.2d 458 (N.Y. App. Div. 1964).

Although Respondent now maintains that this case involves only § 3 of Local Law 9, dealing with trash generated in Clarkstown, Resp. Br. 7 n.1, Petitioners were in fact charged with violating not only § 3(C) ("waste generated within the territorial limits of the Town") and § 3(D) ("waste generated or collected within the Town"), but also § 5(A) ("waste of any kind generated or collected outside the territorial limits of the Town"). Amended Verified Compl., R. 395. The trial court treated this case as involving both § 3 and § 5. Pet. App. 27a.

interstate character merely because they are held briefly for sorting and baling before continuing on to out-of-state destinations.[7] Indeed Respondent's own cases confirm that a temporary delay in an interstate movement will not change its character.[8]

Second, even trash actually generated in Clarkstown is entitled to the protection of the Commerce Clause. This Court has long held that the local acquisition of articles

[7] *Maryland v. Louisiana*, 451 U.S. 725, 729, 754-55 (1981) (natural gas halted for processing does not lose interstate character); *Chicago Board of Trade v. Olsen*, 262 U.S. 1, 33 (1923) (grain temporarily in warehouse for inspection, weighing, grading and mixing did not lose interstate character).

[8] *E.g.*, *United States v. Tobin*, 576 F.2d 687, 693 (5th Cir.) (two-year interruption of movement of stolen goods did not destroy their interstate character), *cert. denied*, 439 U.S. 1051 (1978); *United States v. Garber*, 626 F.2d 1144, 1148 (3d Cir. 1980) ("[d]elays enroute do not deprive shipments of continued characterization as interstate or foreign so long as the goods have not yet reached their destination. . . ."), *cert. denied*, 449 U.S. 1079 (1981).

for interstate shipment constitutes interstate commerce.[9] Moreover, where articles are acquired and then sorted locally to determine their final destination, the entire process is part of an interstate movement and protected from state interference. *Allenberg Cotton Co. v. Pittman*, 419 U.S. 20, 30 (1974).[10] Because Clarkstown no longer has a landfill, J.A. 9, R. 58, trash collected in the town is destined from the outset for another state and is thus in interstate commerce.

Third, Respondent's argument—that local processing may be required as long as it is imposed prior to actual shipment—is directly contrary to established Commerce Clause jurisprudence. In *Pike v. Bruce Church, Inc.*, 397 U.S. 137, 141 (1970), the state had argued that "all that will be regulated will be the intrastate packing of goods destined for interstate commerce." 397 U.S. at 140. But the Court concluded, "If the appellant's theory were correct, then statutes expressly requiring that certain kinds of processing be done in the home State before shipment to a sister State would be immune from constitutional challenge." *Id.* at 141. Respondent's regulation cannot evade Commerce Clause scrutiny based on a similarly flawed argument.

Parker v. Brown, 317 U.S. 341 (1943), upon which Respondent primarily relies, does not require a different result. The *Parker* Court reasoned that the regulation

[9] *Shafer v. Farmers Grain Co.*, 268 U.S. 189, 198-99 (1925) (purchase of grain in-state for shipment out-of-state is interstate commerce); *Lemke v. Farmers' Grain Co.*, 258 U.S. 50, 54-55 (1922) (same); *Dahnke-Walker Milling Co. v. Bondurant*, 257 U.S. 282, 290-92 (1921) (purchase of wheat in-state for shipment out-of-state is interstate commerce); *Eureka Pipe Line Co. v. Hallanan*, 257 U.S. 265, 272 (1921) (transmission of stream of oil is interstate commerce from beginning of flow).

[10] In *Allenberg*, the Court held that purchase, delivery to a local warehouse, and sorting and classification of cotton so that its destination could be determined were all a part of interstate commerce such that the purchaser did not need a license to do such business in the state. 419 U.S. at 19.

in that case controlled the disposition of the goods prior to their sale, processing and packing for interstate shipment. Here, by contrast, the ordinance controls the disposition of Petitioners' trash only *after* it has been processed and baled and the nonrecyclable residue is "ready for shipment in interstate commerce." 317 U.S. at 361. Moreover, unlike the locally grown raisins in *Parker*, the "goods" here originated in other states or towns and had already begun their movement in commerce prior to their arrival in Clarkstown.

In any event, the "mechanical test" applied in *Parker* to determine whether an article was in commerce—which involved a rigid distinction between "commerce" and "manufacture"—was an anachronism even in its own time[11] and has not been applied in subsequent cases.[12] The *Parker* Court itself observed that "courts are not confined to so mechanical a test" and relied heavily on other grounds. 317 U.S. at 362. More recent cases have limited *Parker*'s Commerce Clause holding to its unique factual context.[13]

[11] *Parker* itself noted that its mechanical, temporal distinction between local manufacture and interstate commerce had "sometimes" been applied. In fact, with respect to the reach of federal authority, the Court had already begun its assault on the principle that "manufacturing in itself is not commerce." *NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1, 34 (1937). And the cases on which *Parker* relied, which found some form of "manufacture" rather than "commerce" in order to permit state taxation, have become obsolete since the Court "abandoned the abstract notion that interstate commerce 'itself' cannot be taxed by the States." *D.H. Holmes Co. v. McNamara*, 486 U.S. 24, 30 (1988).

[12] For example, in *Allenberg*, the dissent argued that the Court had ignored *Parker* in ruling that the sorting of goods in the warehouse was an aspect of interstate commerce. *See* 419 U.S. at 35-36 (Rehnquist, J., dissenting). *See also Pike*, 397 U.S. at 141 (rejecting approach similar to *Parker* and recharacterizing the cases on which *Parker* relied).

[13] The Court in *Parker* had concluded that the problems of the raisin industry (which existed solely in California) were too local in nature to be addressed by Congress and that the California

The local monopoly cases cited by Respondent and amici are also inapposite.[14] Those cases merely uphold the validity of local regulations granting or creating monopolies with respect to public services for local residents, such as sewage disposal, that are accomplished wholly within the jurisdiction. None of those cases implicates, as this one does, the free flow of interstate commerce.

The progenitor of those cases was this Court's decision in *California Reduction Co. v. Sanitary Reduction Works*, 199 U.S. 306 (1905), in which San Francisco had granted one company an exclusive right to destroy by cremation such items as house refuse, bones, sludge, dead animals, and putrid vegetables, fish or flesh. Businesses and households were not permitted to dispose of these items other than through the incinerator, which was in turn required to cremate them within 24 hours. In 1905, there was no prospect that any of these articles would be transported out of state and there was no challenge based on Commerce Clause grounds. The Court simply rejected, on public health grounds, a challenge based on the theory that the mandatory incineration of refuse constituted a taking without compensation under the Fourteenth Amendment. *Accord, Gardner v. Michigan*, 199 U.S. 325 (1905).

The local monopoly cases cited by Respondent and its amici are similarly limited. For example, the cases mandating a local sewage connection do not implicate inter-

program was fully consistent with federal legislation authorizing the Secretary to issue marketing orders of the same type the state had issued and to cooperate in formulating and funding locally based programs. 317 U.S. at 362-68. *Parker* has since been explained as a case based on this congruity of federal and state legislation. *Northwest Cent. Pipeline Corp. v. State Corp. Comm'n*, 489 U.S. 493, 524 (1989). *See generally* Laurence Tribe, *American Constitutional Law* § 6-26, at 491 (2d ed. 1988).

[14] *See* Resp. Br. 22; Prince George's County Br. 29-37; State of Ohio Br. 4-6; County of San Diego Br. 19-21.

state commerce and none mentions the Commerce Clause. Similarly, none of the cited local monopoly cases relating to electricity or slaughterhouses involved a Commerce Clause challenge.[15] Until the recent cases dealing with flow control, none of the cases relating to solid waste disposal monopolies addressed waste that originated or was disposed of out-of-state.

This case is fundamentally different, because the waste did not originate in Clarkstown, and was not disposed of there.[16] Respondent is instead attempting to divert an incoming stream of interstate waste to its facility, so as to gain an economic benefit. Moreover, Respondent does not dispose of that waste (or its locally-generated waste) within its own borders, but instead ships it to out-of-state landfills. Whatever may be the rule with respect to jurisdictions that merely collect local waste and dispose of it locally, interstate commerce is clearly implicated where a jurisdiction chooses to divert waste originating elsewhere, mandate (and charge for) local processing at a privately owned transfer facility, and ship it to locations in other states for disposal. When a locality chooses to rely on the interstate market as a source of waste, a means

[15] The more analogous scenario is that of a state attempting to prevent a local electric utility from exporting electricity, a restriction that this Court has held invalid under the Commerce Clause. *See New England Power Co. v. New Hampshire*, 455 U.S. 331 (1982).

[16] Of the twenty-seven states that have enacted enabling legislation for flow control laws, fourteen explicitly limit the scope of the laws to locally-generated waste: Colorado, Connecticut, Florida, Illinois, Indiana, Maine, Mississippi, Missouri, North Carolina, Ohio, Pennsylvania, Tennessee, Washington, West Virginia. *See* Pet. Br. 14 n.8; *see also* New Jersey Br. 5, 9, 14 ("Local waste flow laws . . . direct only locally generated waste."); Springfield, Missouri Br. 13-14 & n.7 ("The *only* waste typically affected is the trash generated by local citizens. . . . Flow control, of course, does not purport to affect the actions of citizens—or their trash—from any other jurisdiction.").

of disposition, or both, it must comply with the requirements of the Commerce Clause protecting that market.[17]

II. LOCAL LAW 9 IS PER SE INVALID

As indicated in our opening brief, this Court's decision in *City of Philadelphia* makes clear that both trash import bans and trash export bans are virtually *per se* invalid under the Commerce Clause. A state "cannot overtly block[] the flow of interstate commerce at a State's borders." 417 U.S. at 624. It makes no difference whether "the article of commerce [is shut] inside the State in one case and outside the State in the other." *Id.* at 628. Thus, Respondent's statement that Local Law 9 "takes no account of the origin of the garbage," Resp. Br. 26, is immaterial; Local Law 9 clearly bans the export of trash without local processing, and thus directly restrains the flow of interstate commerce. Pet. Br. 16-25.

Respondent attempts to avoid this rule of virtual *per se* invalidity by pointing to the burden Local Law 9 imposes on local residents, by asserting the existence of an environmental purpose rather than a commercial purpose, and by characterizing Local Law 9 as a "quarantine" of

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[17] Indeed, the County of Rockland, in which Clarkstown is located, draws a distinction between "local garbage sitting at a curb, or being trucked to the local landfill" and "garbage in a truck destined for a distant landfill or waste to energy plant," and argues:

> It is the failure or inability of the local government to manage the waste, necessitating the interstate movement of the waste, which creates the "commerce" protected by the Commerce Clause. The interstate garbage market is available to grapple with the unmanaged waste for a fee. However, if the waste can be eliminated at the source, or managed locally, through incineration, recycling, composting or the like, then the need for an interstate transaction never arises, and the solid waste never becomes an object of interstate trade.

County of Rockland Br. 21-22; *see also id.* at 28 (discussing *California Reduction*); New York Br. 28 n.15 (distinguishing between application of Local Law 9 to trash originating within the town and outside the town).

trash. Resp. Br. 18-19, 25-38. Each of these factors, however, was also urged upon the Court in *City of Philadelphia*. The New Jersey law in *City of Philadelphia* imposed a burden on local businessmen—New Jersey landfill operators—who joined in the challenge to the law. 437 U.S. at 619. The New Jersey law was supported by legislative and state court findings of an environmental purpose. *Id.* at 625. The state denied that "'New Jersey commercial interests stand to gain advantage over competitors from outside the state. . . .'" *Id.* at 626 (quoting Brief of the State of New Jersey). And the state sought to justify the import ban as a "health-protective" quarantine measure. *Id.* at 628-29. Respondent's attempt to avoid the virtual *per se* rule of invalidity is thus based on the very arguments that this Court in *City of Philadelphia* considered and rejected.

Moreover, as explained in our opening brief, Local Law 9 is also plainly invalid under a solid line of decisions of this Court striking down local processing laws. Pet. Br. 18-23.[18] Those decisions establish that a state or local jurisdiction cannot prohibit the export of goods unless they are first subject to processing in the local jurisdiction. Respondent does not even address those decisions in its brief, although they are directly in point.[19]

The circumstances of this case are, in fact, even more offensive to Commerce Clause principles than those in-

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[18] Those decisions include *South-Central Timber Dev., Inc. v. Wunnicke*, 467 U.S. 82 (1984); *Pike*, 397 U.S. 137; *Toomer v. Whitsell*, 334 U.S. 385, 403-06 (1948); *Foster-Fountain Packing Co. v. Haydel*, 278 U.S. 1 (1928); and *Johnson v. Haydel*, 278 U.S. 16 (1928).

[19] Several *amici* seek to distinguish this Court's local processing cases on the basis of the alleged environmental or governmental goals of flow control. But the fact that "the State is pursuing a clearly legitimate local interest" has never been deemed a justification for a local processing requirement. *South-Central Timber*, 467 U.S. at 100 (quoting *Pike*, 397 U.S. at 143). Any genuine environmental or health and safety concern can be achieved through nondiscriminatory alternatives.

volved in the Court's prior local processing decisions. Here, the articles of commerce did not even originate within the local jurisdiction. Moreover, Local Law 9 requires not only local processing, but *duplicate* local processing; after the non-recyclable trash has been sorted and baled at Petitioner's facility, it must be brought to the town's designated transfer station for similar processing. And here, unlike the earlier local processing cases, the town derives a direct financial benefit from the ordinance.

As the Court explained in *City of Philadelphia*, "The evil of protectionism can reside in legislative means as well as legislative ends." 437 U.S. at 626. A requirement of local processing is precisely the type of invalid legislative means that has consistently been struck down.

Contrary to Respondent's assertion, the fact that legislation may impose some burden on local residents does not establish its validity under the Commerce Clause. An export ban *always* places a burden on *some* local residents. A requirement that natural resources remain at home burdens local owners of those resources. A requirement that local coal be used in producing electricity raises prices for local ratepayers. A requirement of local processing prior to interstate shipment burdens local exporters. The determinative question is not the presence or absence of a local burden, but the fact that "the practical operation and effect of the provisions complained of will be directly to obstruct and burden interstate commerce." *Foster-Fountain*, 278 U.S. at 13. This is precisely what Local Law 9 does.

In any event, the net effect of Local Law 9 is to *benefit*, rather than to burden, local residents. With or without flow control, Clarkstown residents must ultimately bear the cost of the town's guarantee to the designated facility. As to local trash, flow control is essentially neutral—it means only that the cost is paid through increased tipping fees, rather than higher taxes or utility bills. But for every ton of out-of-town trash that Clarks-

town can force Petitioners to send to the designated facility, rather than directly to final disposal sites, the town's potential liability under its guarantee is reduced by $81. Thus, even if the existence of a local burden were relevant—which it is not—Local Law 9 imposes no net burden on local residents in this case and creates a financial advantage for the town.

III. EVEN UNDER THE *PIKE* BALANCING TEST, APPLICATION OF LOCAL LAW 9 TO PETITIONERS' BUSINESS IS INVALID

Even if Local Law 9 were analyzed under the *Pike* balancing test applicable to laws having only an incidental effect on interstate commerce, it would have to be struck down. Respondent does not deny that Local Law 9's local processing requirement requires Petitioners to pay an additional $81 per ton for disposal of their nonrecyclable trash. Nor does Respondent deny that Local Law 9 harms Petitioners' out-of-town customers by depriving them of a lower cost alternative for disposing of their trash. And Respondent does not deny that flow control laws discourage technological innovation in trash processing, and discourage entry into the trash processing business. *See* Pet. Br. 31-35.

The burden on interstate commerce is exacerbated here because much of the trash handled by Petitioners originates in New Jersey. Pet. App. 26a. Under New Jersey's flow control laws, local waste may be taken out of the state for the sorting of recyclables—"as long as the residual solid waste is returned to New Jersey." New Jersey Br. 5. But under Local Law 9, Petitioners are *prohibited* from taking the New Jersey-originated residue back to New Jersey. It is thus literally impossible for Petitioners to comply with the flow control laws of both jurisdictions. This type of actual conflict among jurisdictions is a significant, if not dispositive, factor weighing against the validity of the measure. *See Bibb v. Navajo Freight Lines, Inc.*, 359 U.S. 520, 526-28 (1959);

Southern Pac. Co. v. Arizona, 325 U.S. 761, 773 (1945).[20]

Respondent and its amici assert a variety of justifications for Local Law 9 based on the health, waste management, and environmental benefits of the transfer station in comparison with the local landfill that it replaced. Clarkstown has the unquestioned right to pursue those goals by adopting nondiscriminatory standards with respect to the handling of trash, applicable alike to Petitioners and the designated facility. But that is not what Local Law 9 does.[21]

Respondent maintains that Local Law 9 is needed to ensure proper processing of the trash and to ensure that the trash will not go to cheap, environmentally unsound landfills. Resp. Br. 25, 45. But as far as the record discloses, the processing that occurs at the designated facility and the processing that occurred at Petitioners' facility does not differ in any material respect, except

[20] The balancing test does not depend on whether a burden on interstate commerce has actually caused a redirection of the flow of commerce. In *Southern Pacific*, for example, this Court did not require a showing that Arizona's limit on train lengths had actually caused train routes to be diverted around Arizona.

[21] Respondent's attempt to justify Local Law 9 as a quarantine, Resp. Br. 18-19, will not withstand analysis. The essence of a quarantine law is to keep dangerous commodities out of a locality, or at least to minimize their exposure, because "their very movement risked contagion and other evils." *City of Philadelphia*, 437 U.S. at 628-29. But here, Local Law 9 requires *additional* movement and *additional* exposure of the trash. In the absence of flow control, Petitioners' nonrecyclable trash would be loaded into closed vehicles and moved directly to out-of-state destinations, with no further exposure in Clarkstown. Local Law 9 requires that, instead, the nonrecyclable trash be moved from Petitioners' facility to the designated transfer station, unloaded, subjected to further handling, and then re-loaded for transport out of state.

Further, Clarkstown has contracted with at least one other jurisdiction to bring *more* trash into the town for processing at its facility. J.A. 28, R. 129; J.A. 118, R. 333. This fact alone belies the characterization of Local Law 9 as a quarantine.

that Petitioners separated the recyclables from nonrecyclables. And it is undisputed that the town's designated transfer facility sends its trash to some of the same landfills as Petitioners. Carbone Aff., J.A. 118, R. 333; *accord* New York State Br. 20 n.13.[22]

Moreover, flow control laws are just as likely to lead to disposal at *less* environmentally sound sites than would be selected in a free market. *See* National Solid Waste Management Association Br. 6-7 (citing Ohio experience). Waste generators that would prefer to minimize potential liability by directing all waste to a few specialized state-of-the-art disposal sites are precluded from doing so by flow control laws. *Id.; see also* Chemical Manufacturers Association Br. 5-6.[23]

Respondent also seeks to justify Local Law 9 as necessary to obtain financing for the designated transfer station. Resp. Br. 8-9, 30. But Clarkstown did not enact Local Law 9 until nearly a year *after* awarding the contract for the construction and operation of the transfer station.[24] Only the take-or-pay tonnage guarantee

[22] As to disposal sites located outside Clarkstown, those sites are properly regulated by their respective localities and by the federal government. "If farmers or manufacturers in Vermont are abandoning farms and factories, or are failing to maintain them properly, the Legislature of Vermont and not that of New York must supply the fitting remedy." *Baldwin v. G.A.F. Seelig, Inc.*, 294 U.S. 511, 524 (1935).

[23] Other justifications asserted for flow control are made irrelevant by the fact that the trash involved here originated out of town and was headed out of state. In this context, Local Law 9 has nothing to do with obtaining an accurate characterization of local waste streams, *see* New York State Br. 12, or monitoring hazardous waste at landfills. *See* Solid Waste Assoc. of North America Br. 8. Nor does the shipment of out-of-town waste to out-of-town sites interfere with the ability of a locality to reduce the generation of local trash through imposing high disposal or utility fees. *See* Prince George's County Br. 27; New York State Br. 12.

[24] The town awarded the contract for the construction and operation of the transfer station in January 1990. Pet. App. 4a. It

was even arguably pertinent to the financing of the facility, not flow control itself. And in any event, Respondent cites no authority for upholding a revenue measure, otherwise violative of the Commerce Clause, based on the benefits of the governmental projects for which the revenue measure was enacted.

Moreover, Local Law 9 is being applied here to out-of-town waste, not to waste generated by local residents. *Not one* of Respondent's many amici even suggests that a locality must guarantee control of all *out-of-town* waste that enters its borders in order to obtain financing. Nor could they. Since the volume of out-of-town waste to a facility such as Petitioners' is determined by competitive factors such as price, there can be no assurance of continued volume when flow control is used to impose an artificial price.[25]

In the end, the only real "benefit" is the town's interest in reducing its payments under the tonnage guarantee. Pet. Br. 31. This purely economic interest—itself evidence of protectionism—is plainly insufficient to justify the burden imposed on interstate commerce by the Clarkstown ordinance.

IV. CONGRESS HAS NOT AUTHORIZED THIS DISCRIMINATION AGAINST INTERSTATE COMMERCE

As a final line of defense, a few amici—though not Respondent—have argued that, even if flow control laws restrict interstate commerce, Congress authorized them in one section of the Resource Conservation and Recovery

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adopted Local Law 9 on December 31, 1990. Holbrook Aff., J.A. 9, R. 58; Amended Verified Complaint, R. 394.

[25] Indeed, the National Association of Bond Lawyers appends two examples of municipal bonds, neither of which contemplates restrictions on out-of-town trash. Bond Lawyers Br. A-15, A-43. Similarly, New Jersey, a proponent of flow control, acknowledges in its amicus brief that under its flow control laws, "no attempt is made by New Jersey to direct waste merely being processed in . . . New Jersey." New Jersey Br. 5.

Act ("RCRA"), 42 U.S.C. § 6945(a)(5).[26] However, that provision, which says nothing about flow control, falls far short of the clear and unambiguous congressional action necessary to authorize a local interference with interstate commerce.

This Court's opinions establish a strict "rule requiring a clear expression of approval by Congress" before holding state legislation immune from Commerce Clause scrutiny. *Wunnicke*, 467 U.S. at 92. Thus, in *Sporhase v. Nebraska*, 458 U.S. 941 (1982), despite thirty-seven federal statutes and a number of interstate compacts demonstrating congressional deference to state water law, the Court found no indication "that Congress wished to remove federal constitutional restraints on such state laws" restricting the export of ground water. *Id.* at 960. The Court noted, "In the instances in which we have found such consent, Congress' " 'intent and policy' to sustain state legislation from attack under the Commerce Clause" was " 'expressly stated.' " *Id.* (citation omitted). In its most recent decision on this point, the Court again emphasized that the local entity has a "burden of demonstrating a clear and unambiguous intent on behalf of Congress to permit the discrimination against interstate commerce. . . ." *Wyoming v. Oklahoma*, 112 S. Ct. 789, 802 (1992).

Amici have not pointed to any statutory provision that satisfies this test. Section 4003(a)(5) of RCRA, 42 U.S.C. § 6943(a)(5), requires only that states permit local jurisdictions to enter into long-term contracts for the supply of solid waste to recycling facilities and for the sale of the products of those facilities. On its face, this provision does not authorize flow control laws. It is concerned with municipal *contracting* authority, not with municipal *regulatory* authority. Moreover, it deals with limitations imposed by state law, not with the restrictions

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[26] *See, e.g.*, National Association of Bond Lawyers Br. 17-22. In similar circumstances, this Court has declined to address the issue. *See Chemical Waste Management, Inc. v. Hunt*, 112 S. Ct. 2009, 2016 n.9 (1992).

imposed by the Commerce Clause. There is no indication that Congress "affirmatively contemplate[d] otherwise invalid state legislation" and manifested a "clear and unambiguous intent" to permit local jurisdictions to interfere with the free flow of interstate commerce. *Wunnicke*, 467 U.S. at 91-92; *Wyoming*, 112 S. Ct. at 802.[27] To the contrary, Congress emphasized that it "intends this prohibition [of Section 4003(a)(5)] to be as narrow as it is written and to apply only to prohibitions on the long term supply of discarded materials from a governmental body to a resource recovery facility." H.R. Rep. No. 1491, 94th Cong., 2d Sess. 34 (1976), *reprinted in* 1976 U.S.C.A.A.N. 6238, 6272.

The limited scope of § 4003(a)(5) is confirmed by the EPA's subsequent interpretation. Noting that "[t]his section reflects the concern that the development of resource recovery facilities has been hindered by restrictive procurement laws," 43 Fed. Reg. 38,534, 38,538 (1978), EPA implemented this provision with regulations that did not approve or even refer to flow control. 40 C.F.R. §§ 256.01(b)(5), 256.30(b), 256.31(b). Indeed, in a different subsection, EPA affirmed the concept of free movement of solid waste among jurisdictions:

> (h) The State plan should provide for substate cooperation and policies for free and unrestricted movement of solid and hazardous waste across State and local boundaries.

40 C.F.R. § 256.42(h). *See also* 44 Fed. 45,066, 45,076 (1979) (preamble).

Nor has Congress itself treated RCRA as an authorization of flow control. To the contrary, flow control is

[27] The National Association of Bond Lawyers also cites Section 32(f) of the Solid Waste Disposal Act Amendments of 1980, codified at 42 U.S.C. § 6948(d)(3)(C), but this provision is completely ambiguous. It authorizes technical assistance to local governments in removing "legal, institutional, and economic impediments" to resource recovery and conservation, but does not discuss what those "impediments" are. They may well include *restrictions* on interstate movement of waste, such as those imposed here.

just now receiving serious congressional attention, and bills to authorize flow control in specified circumstances are currently pending.[28] Thus far, however, the only action taken by Congress has been to request EPA to study the impact of flow control laws and to report its conclusions to Congress by September 1994.[29] EPA has just completed a series of public hearings, 58 Fed. Reg. 37,477 (1993), in which it received a wide range of comments both supporting and opposing flow control.[30]

This ongoing congressional and administrative attention confirms that flow control is not authorized by existing legislation. It also confirms that Congress is well aware of the interstate repercussions of such laws and, with the advice of EPA, is actively addressing the issue. If there are valid policy reasons for permitting state or local restrictions on the export of trash, Congress is fully empowered to authorize such action—subject to whatever limitations it may decide are appropriate. But no local jurisdiction can, consistent with the Commerce Clause, *require* local processing of trash in the absence of congressional authorization.[31]

[28] H.R. 1357, 103d Cong., 1st Sess. (Mar. 16, 1993); H.R. 2649, 103d Cong., 1st Sess. (July 15, 1993).

[29] H.R. Conf. Rep. No. 902, 102d Cong., 2d Sess. 48 (1992), accompanying Pub. L. 102-389, 106 Stat. 1571.

[30] EPA's Notice called for comments on such issues as the health, environmental, and economic impacts of flow control; the potential inefficiencies that flow control may foster; possible free market approaches to achieve flow control goals, and nonlegislative options. 58 Fed. Reg. at 37,478.

[31] The City of Springfield seeks to characterize the designated facility here as a "public" facility and argues that the town, as a market participant, can compel use of the facility free of Commerce Clause limitations. Springfield Br. 25-26. But even if Clarkstown's designated facility were government-owned, which it is not, the market participant doctrine has no application here. That doctrine permits a state or locality to discriminate in favor of its residents when acting as a purchaser or seller on the open market; that is, the government in that situation has the prerogative to choose with whom it will deal, like any other purchaser or seller. *Reeves, Inc. v. Stake*, 447 U.S. 429, 439-40 (1980); *Hughes*

CONCLUSION

The Court should reverse the decision below.

Respectfully submitted,

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v. Alexandria Scrap Corp., 426 U.S. 794, 806, 808 (1976). But Petitioners are not seeking to do business with the designated facility; they are being *required* to do business with it. Local Law 9 is plainly a regulatory measure outside the market participant exception. *See New Energy Co. v. Limbach*, 486 U.S. 269, 277-78 (1988).

The Sherman Act theory of Prince George's County, Maryland and the City of San Diego is based on a fundamental misconception of the antitrust immunity set out in *Parker v. Brown*. These amici apparently contend that if a local law is immune from antitrust attack, then it should also be immune from Commerce Clause attack. Prince George's County Br. 47-49; San Diego Br. 26-27. The state action doctrine is an exception to existing prohibitions in antitrust laws; to hold that it amounts to congressional authorization of all state-sanctioned conduct for Commerce Clause purposes would have the result of all but eliminating the negative Commerce Clause.